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No. 03-814

In The
Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The First Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE UNIVERSITY OF SAN FRANCISCO MARITIME LAW JOURNAL IN SUPPORT OF PETITION FOR *CERTIORARI*

JOHN R. HILLSMAN
MCGUINN, HILLSMAN & PALEFSKY
535 Pacific Avenue
San Francisco, CA 94133
(415) 421-9292

Counsel for the University of San Francisco Maritime Law Journal, Amicus Curiae

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR *CERTIORARI*

The University of San Francisco Maritime Law Journal ("USFMLJ") herewith respectfully moves this Court, pursuant to Rules 21.2(b) and 37.2, for leave to file an *amicus curiae* brief in support of the Petition for *Certiorari* filed by Willard Stewart.

The USFMLJ is a non-profit, student-run law journal affiliated with the University of San Francisco School of Law. Its primary mission is to publish a biannual legal periodical to which academics and attorneys can turn for commentary on the latest developments in maritime law. It reaches subscribers both here and abroad and publishes articles submitted by students, professors and practitioners from all across the country. As part of that mission, it oversees several aspects of the maritime law program offered by the University of San Francisco School of Law, administers an internship program whereby law students receive academic credit for performing clinical work in maritime law firms, publishes the proceedings of the Pacific Admiralty Seminar, and sponsors the Judge John R. Brown National Admiralty Moot Court Competition whenever it convenes in the San Francisco Bay Area.

The USFMLJ has published several notes and comments on issues arising under the Jones Act, 46 U.S.C.A. § 688, and believes that the Petition for *Certiorari* filed by Willard Stewart frames an issue whose resolution is vital to the uniform interpretation and efficient administration of that statute. It is for these reasons that movant

respectfully request leave to file the attached *amicus curiae* brief in support of that Petition.

January 7, 2004

Respectfully submitted,

JOHN R. HILLSMAN
MCGUINN, HILLSMAN & PALEFSKY
535 Pacific Avenue
San Francisco, CA 94133
(415) 421-9292

Counsel for the University of San Francisco Maritime Law Journal, Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

This brief is being filed, with the consent of Petitioner Willard Stewart, on behalf of the University of San Francisco Maritime Law Journal ("USFMLJ"). The USFMLJ is a non-profit, student-run law journal affiliated with the University of San Francisco School of Law.[1] It publishes a biannual legal periodical which comments exclusively on maritime law. That periodical reaches subscribers both here and abroad and publishes articles submitted by students, professors and practitioners from all across the country. The USFMLJ has published several notes and comments about the Jones Act, 46 U.S.C.A. § 688, and believes that this case presents an issue whose resolution is vital to the uniform interpretation and efficient administration of that statute.

SUMMARY OF ARGUMENT

This Court should grant Willard Stewart's petition for *certiorari* to resolve a stubborn conflict over the meaning of the term "vessel." That conflict not only divides the lower federal courts, it has spawned ancillary rifts among the derivative state court decisions.

State courts exercise concurrent jurisdiction over Jones Act cases under the so-called "reverse *Erie* doctrine,"

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[1] This brief was prepared on behalf of the USFMLJ by its counsel. It was not authored, in whole or in part, by counsel for any party. No person or entity other than the USFMLJ, or its counsel, made a monetary contribution to the preparation or submission of the brief. Though the USFMLJ is affiliated with the University of San Francisco School of Law, this brief does not necessarily reflect the views of the University of San Francisco.

whereby all substantive issues are governed by federal maritime law in the interests of uniformity. *Hutchins v. Juneau Tanker Corp.*, 28 Cal.App.4th 493, 499, 33 Cal.Rptr.2d 542 (1994). Here in California, the State Court of Appeal has traditionally followed the maritime decisions of the Ninth Circuit so that "the same rules will be applied in federal and state courts in California." *Keith v. S.S. Goldstone*, 81 Cal.App.3d 699, 704 (1978). But that State's Second District Court of Appeal recently deviated from this tradition by adopting the First Circuit's holding in *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1326 (1st Cir. 1992) (*en banc*). *See, Spears v. Kajima Eng. & Const. Co.*, 101 Cal.App.4th 466, 475, 124 Cal.Rptr.2d 97 (2002). State and federal courts in California now apply different rules for identifying the water craft that qualify as vessels under the Jones Act. *Compare Spears with Martinez v. Signature Seafoods, Inc.*, 303 F.3d 1132, 1136 n.2 (9th Cir. 2002). Worse, they are entering inconsistent judgments in cases which are materially indistinguishable. *Compare e.g., Gipson v. Kajima Eng. and Const., Inc.*, 972 F.Supp. 537, 542-43 (C.D.Cal. 1997) (unpowered crane barge deployed to repair bridge could not be vessel) *with Gault v. Modern Continental/Roadway Const. Co., Inc. J.V.*, 100 Cal.App.4th 991, 1005, 123 Cal.Rptr.2d 85 (2002) (unpowered crane barge deployed to repair bridge could be vessel). "With this surfeit of doctrine to choose from, it is not surprising that there are many close cases on vessel status – approaching the point of arbitrariness." Thomas J. Schoenbaum, *Admiralty and Maritime Law* (3rd ed. 2001) Vol.1, § 6-9, p. 284.

This case presents an opportunity to ameliorate those arbitrary results with a much needed uniform rule. It would also allow this Court to finish the work it began during the 1990's when it took the Jones Act in hand and

ruled that: "The inquiry into seaman status is fact specific; it will depend on the nature of the vessel and the employee's precise relationship to it." *McDermott Int'l. v. Wilander*, 498 U.S. 337, 356 (1991). The four opinions this Court handed down to elaborate that "precise relationship" not only clarified the distinction Congress drew between "sea-based workers" and "land-based workers," *id.* at 353-54, they spelled out the "essential elements" of seaman status. *Chandris, Inc. v. Latsis,* 515 U.S. 347, 368 (1995); *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554 (1997); *see also, Southwest Marine, Inc. v. Gizoni* ("*Gizoni I*"), 502 U.S. 81 (1991).

But those four opinions did not get an opportunity to address the question of vessel status. To quote the decision below, "they have left the lower courts to fret, largely unguided, over what is or is not a vessel in navigation." *Stewart v. Dutra Const. Co., Inc.* ("*Stewart I*"), 230 F.3d 461, 466 (1st Cir. 2000), *Appendix B* at App. 21. All this fretting has split the circuits, estranged the Jones Act from the Longshore and Harbor Workers Compensation Act ("LHWCA"),[2] and perpetuated the notorious "zone of uncertainty" which lurks at the borderline between those two statutes. The Petition presents an opportunity to bind up the conflicts, bring the Jones Act back in step with the LHWCA, and alleviate some of the uncertainty still besetting the maritime workers "who must choose whether and by what means they will pursue remedies that in substantive theory are perfectly mutually exclusive (the Compensation Act, which for present purposes applies to all but seamen, and the Jones Act, which applies only to

[2] 33 U.S.C. §§ 901 *et seq.*

seamen), but which seem in practice to frequently overlap each other's borders." *Simms v. Valley Lines, Inc.*, 709 F.2d 409, 411 (5th Cir. 1983).

ARGUMENT

I. The Court should accept *certiorari* to bind up the conflicting definitions which the lower courts have applied to the term "vessel" with a much needed uniform rule

The Jones Act permits "[a]ny seaman injured in the course of his employment" to sue his employer for negligence. Because Congress did not define who is or is not a "seaman," the courts have had to make that determination for themselves. *Id.* at 343-51. Over the years, no fewer than ten[3] of the eleven U.S. Circuit Courts have weighed in on the question. Forced to make an independent determination of the conflicting federal principles, state courts have added their constructions to this already crowded corner of the law.[4] The resulting

[3] *See, DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir. 1992); *Latsis v. Chandris, Inc.*, 20 F.3d 45 (2nd Cir. 1994), *aff'd*, 515 U.S. 347 (1995); *Reeves v. Mobile Dredging & Pumping Co.*, 26 F.3d 1247 (3rd Cir. 1994); *Stephenson v. McLean Const. Co.*, 863 F.2d 340 (4th Cir. 1988); *Holland v. Allied Structural Steel Co., Inc.*, 539 F.2d 476 (5th Cir. 1976), *cert. denied*, 429 U.S. 1105 (1977); *Hatch v. Durocher Dock & Dredge, Inc.*, 56 F.3d 545 (6th Cir. 1994); *Johnson v. John F. Beasley Const. Co.*, 742 F.2d 1054, 1063 (7th Cir. 1984); *Johnson v. Continental Grain Co.*, 58 F.3d 1232 (8th Cir. 1995); *Southwest Marine, Inc. v. Gizoni ("Gizoni II")*, 56 F.3d 1139, 1142 (9th Cir. 1995); *Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504 (11th Cir. 1990).

[4] *See, e.g.*; *Soucie v. Trautwein Bros.*, 275 Cal.App.2d 20 (1969) (pile driver held seaman); *O'Bryan v. Folk Const. Co.*, 594 So.2d 900 (La.App. 1991) (suction dredge hand held seaman); *Allen v. Mobile Interstate Piledrivers*, 475 So.2d 427 (Ala.Sp.Ct. 1985) (pile driver held seaman);

(Continued on following page)

jurisprudence became very tangled indeed. As this Court famously observed: "'We have made a labyrinth and got lost in it.'" *Wilander*, 498 U.S. at 353 *quoting Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054, 1060 (7th Cir. 1984).

In order to light the way out, the Supreme Court accepted *certiorari* in four Jones Act cases during the 1990's. The ensuing opinions "jettison[ed]" the traditional requirement that a seaman be aboard "primarily to aid in navigation," *Wilander*, 498 at 353, emphasized that it is the plaintiff's connection to a vessel and not his or her particular job that is determinative, *Gizoni I*, 502 U.S. at 88, rejected a "snapshot" or "moment of the injury" approach in favor of a scrolling analysis which assesses the "total circumstances" of the plaintiff's overall employment, *Chandris*, 515 U.S. at 363, "eschew[ed] the temptation to create detailed tests," *id.* at 369, and ruled that:

> '[T]he essential requirements for seaman status are twofold. First . . . an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission. . . .
>
> Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.' *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554 (1997) *quoting Chandris, supra*, 515 U.S. at 368.

Maloney v. State, 141 N.Y.S.2d 207 (N.Y. Ct. Cl. 1955), *aff'd*, 154 N.Y.S.2d 132, 2 A.D.2d 872, *aff'd*, 165 N.Y.S.2d 465, 144 N.E.2d 364, 3 N.Y.2d 356 (1956) (derrick barge hand held seaman). Each of these holdings conflicts with the decision below.

But those clarifications have left one last twist in the labyrinth; they did not address the standard for Jones Act vessel status. *Stewart I*, 230 F.3d at 466, *Appendix B* at App. 21.

A. The statutory rule of construction

Though the relevant portions of the Jones Act neither use nor define the term "vessel," many other federal statutes do.[5] Those statutes all echo the definition set forth in the federal Rules of Construction: "The term 'vessel' includes every description of water craft or other artificial contrivance used, *or capable of being used*, as a means of transportation on water." 1 U.S.C. § 3 (emphasis added). This Court cited that Rule in *Norton v. Warner Co.*, 321 U.S. 565, 571 n.4 (1944), when it held that: "A barge is a vessel within the meaning of the [Jones] Act even when it has no motive power of its own, since it is a means of

[5] Those statutes include the Shipping Act (46 U.S.C. § 2101(45)), the Merchant Marine Act of 1920 (46 U.S.C. § 801), the International Navigation Rules Act of 1980 (33 U.S.C. § 1601(1)), the Inland Navigation Rules Act of 1980 (33 U.S.C. § 2003(a)), the Public Health Service Act (42 U.S.C. § 201(i)), the Excise Taxes Act (26 U.S.C. § 5688(c)), the Whaling Convention Act (16 U.S.C. § 916(e)), the Neutrality Act of 1939 (22 U.S.C. § 456(c)), the Navigation Act of 1974 (33 U.S.C. § 1502(19)), the Oil Pollution Act of 1990 (33 U.S.C. § 2701(37)), the Sentencing Reform Act (18 U.S.C. § 3667), the Communications Act of 1934 (47 U.S.C. § 153(w)(1)), the Tariff Act of 1930 (19 U.S.C. § 1401(a)), the Interstate Act against Importation and Exportation of Motor Vehicles, Vessels and Aircraft (18 U.S.C. § 533(c)(3)), the Comprehensive Environmental Response Compensation and Liability Act of 1980 (42 U.S.C. § 9601(28)), the Anti-Gambling Act (19 U.S.C. § 1081), the Federal Ship Mortgage Insurance Act (46 U.S.C. § 1271(b)), the Contraband Seizure Act (49 U.S.C. § 787(a)), the Antifouling Paint Control Act of 1988 (33 U.S.C. § 2402(11)), the Interstate Commerce Act (49 U.S.C. § 10102(28)), the Submarine Cable Act (47 U.S.C. § 30) and the Federal Water Pollution Control Act (33 U.S.C. § 1321(a)(3)).

transportation over water." *Id.* at 571. *See also, Ellis v. Eastern Dredging Co.*, 206 U.S. 246, 259 (1906) (holding dredge "vessel" under 1 U.S.C. § 3).

At one time, the statutory vessel definition was also followed by the Fifth Circuit, *Burks v. American River Transp. Co.*, 679 F.2d 69, 75 (5th Cir. 1982), and perhaps even by the First. *See, Bennett v. Perini Corp.*, 510 F.2d 114, 116 (1st Cir. 1975) ("To be a vessel, the purpose and business must to some reasonable degree be the transportation of passengers, cargo, or equipment from place to place across navigable waters."). This is hardly surprising. "Maritime tort law is dominated by statute," and those statutes must be uniformly applied. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990). *Id.* But 1 U.S.C. § 3 no longer commands such application.

B. The "floating work platform doctrine" and the narrow vessel standards of the Second, Fifth and Eleventh Circuits

While Judge Wisdom was still on the bench, the Fifth Circuit stood by the statutory definition, *see, Burks, supra,* and accorded Jones Act vessel status to a whole armada of "special purpose structures not usually employed as a means of transportation." *Offshore Co. v. Robison,* 275 F.2d 769, 779-80 (5th Cir. 1959); *see also, Blanchard v. Engine & Gas Compressor Services, Inc.,* 575 F.2d 1140, 1142 (5th Cir. 1978); *Hicks v. Ocean Drilling and Exploration Co.,* 512 F.2d 817 (5th Cir. 1975), *cert. denied,* 423 U.S. 1050 (1976). But in 1984, that Circuit launched the "floating work platform doctrine." *Bernard v. Binnings Constr. Co.,* 741 F.2d 824 (5th Cir. 1984).

Based on three "non-requisite criteria" and nine free-floating "factors," the floating work platform doctrine

denies vessel status to any water craft that is not used *primarily* for transportation. *Ellender v. Kiva Constr. & Eng'g, Inc.*, 909 F.2d 803, 806 (5th Cir. 1990). The "non-requisite criteria" inquire whether the craft at issue was (a) constructed and used primarily as a work platform rather than for transporting people or things, (b) moored or otherwise secured at the time of the accident, and (c) capable of anything other than a "merely incidental" transportation function; the free-floating factors ask if it had (1) navigational aids, (2) a raked bow, (3) lifeboats or other life-saving equipment, (4) bilge pumps, (5) crew quarters, (6) Coast Guard registration, (7) the ability to float, (8) the ability to move, and (9) a recent history of movement? *See, Bernard*, 741 F.2d at 831-832.

Commentators have criticized this approach as "prolix," "extremely flabby" and given to arbitrary results. David W. Robertson, *The Law of Seaman Status Clarified*, 23 J.Mar.&Com. 1, 14-15 (1992).

> For example, in *Sharp v. Johnson Bros. Corp.*, [917 F.2d 885 (5th Cir. 1990)], the court reversed a summary judgment holding that two spud barges used as pile driving barges and two ordinary flat barges used as work platforms were not vessels; however in *Ellender v. Kiva Construction & Engineering, Inc., supra*, the court upheld summary judgment holding that the pile driving barges in question were not vessels, but only construction platforms. The distinction between these and many of the other vessel cases is without theoretical significance either based upon the objective characteristics of the structures themselves or the relative perils faced by the workers in question. This area of the law cries out for fundamental reform.

Schoenbaum, *supra* § 6-9, p. 284. The work platform doctrine has nonetheless been adopted by the Eleventh Circuit, *Hurst v. Pilings & Structures,* 896 F.2d 504 (11th Cir. 1990), and, in a slightly modified form, by the Second Circuit. *Tonnensen v. Yonkers Contracting Co.,* 82 F.3d 30, 36 (2nd Cir. 1996).

C. The broader vessel standards of the Third, Fourth, Seventh and Ninth Circuits

In contrast to the work platform doctrine, the Ninth Circuit holds "that unusual-looking craft whose purpose is not the transportation of persons or things can be considered vessels under the Jones Act." *Southwest Marine, Inc. v. Gizoni* ("*Gizoni II*"), 56 F.3d 1139, 1142 (9th Cir. 1995); *see also, Estate of Wenzel v. Seaward Marine, Inc.,* 709 F.2d 1326, 1328 (9th Cir. 1983). While this holding conflicts with the standards employed by the First, Second, Fifth, Sixth and Eleventh Circuits, it does not sit so far out on the limb as Petitioner suggests. *Petition* at 14-17.[6]

Because *Kathriner v. UNISEA, Inc.*, 975 F.2d 657 (9th Cir. 1992), ruled that "floating structures are not classified as vessels in navigation if they are incapable of independent movement over water, are permanently moored to land, have no transportation function of any kind, and have no ability to navigate[,]" *id.* at 660, the Petition assumes "every floating structure qualifies as a Jones Act vessel" in the Ninth Circuit "unless it meets all four

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[6] We disagree with Petitioner's understanding of the Ninth Circuit "test," but endorse his prayer for *certiorari*. The various interpretations to which the lower court decisions are susceptible is further evidence of the need for a uniform rule.

Kathriner criteria." *Petition* at 15. But the criteria listed in *Kathriner* were offered as a case specific rationale, not a general rule. "There is no generalized test in the Ninth Circuit for determining whether a craft is a vessel in navigation[.]" *Martinez*, 303 F.3d at 1135. Its decisions are nonetheless consistent with 1 U.S.C. § 3.

The Ninth Circuit only denies vessel status to watercraft that have no transportation function of any kind. *Kathriner*, 975 F.2d at 660-61. It entrusts a jury with the status of any contrivance capable of being used as a means of transportation over water. *Martinez*, 303 F.3d at 1136-37 (fish processing barge); *Gizoni II*, 56 F.3d at 1142 (shipyard work platform); *Estate of Wenzel*, 709 F.2d at 1327-28 (submerged cleaning and maintenance platform). Since they necessarily transport their crew and equipment over water, dredges like the *Super Scoop* have always been treated as vessels in the Ninth Circuit. *Ramos v. Universal Dredging Corp.*, 547 F.Supp. 661, 663 (D.Ha. 1982); *see also, City of Los Angeles v. United Dredging Co.*, 14 F.2d 364 (9th Cir. 1926) (citing 1 U.S.C. § 3).

This ecumenical approach is also followed by the Seventh Circuit, *Johnson*, 742 F.2d at 1063 ("Any floating structure, including those designed for special purposes, is a 'vessel' . . . so long as the structure at some time serves as a means of transportation on water."), the Fourth Circuit, *Hill v. Diamond*, 311 F.2d 789, 791 (4th Cir. 1962) ("It is well established that many special purpose craft, such as dredges, floating derricks and barges equipped for special purposes or operations are vessels within the meaning of the Jones Act[.]"), and the Third Circuit. *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 37 (3rd Cir. 1975) (upholding Jones Act vessel status for a dumb barge because "the Supreme Court has extended

that remedy so as to permit claims brought for injuries incurred in the construction of a "Texas Tower," *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) and an off-shore oil rig, *Gianfala v. Texas Co.*, 350 U.S. 879 (1955)."). *See also, Reeves v. Mobile Dredging & Pumping Co., supra* (holding dredge was vessel for Jones Act purposes).

D. The "actual transit" test and the restrictive vessel standards of the First and Sixth Circuits

Building on the work platform doctrine,[7] misinterpreting the phrase "in navigation,"[8] and misreading the transcript in *Gizoni I*,[9] the First Circuit has ruled that, "if

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[7] *DiGiovanni* relies heavily on *dictum* suggesting " 'that a structure whose purpose is *not* navigation or commerce upon navigable waters may nonetheless satisfy the Jones Act's vessel requirements if, at the time of the worker's injury, the structure was actually in navigation.' " 959 F.2d at 1123 *quoting Bernard*, 741 F.2d 829 (original emphasis).

[8] The phrase "in navigation" is "used in its broad sense and is not confined strictly to the actual navigating or movement of the vessel." *Johnson*, 742 F.2d at 1063; *see generally*, Edwin J. Bull, *Seaman Status Revisited: A Practical Guide to Status Determination*, 6 U.S.F. Mar. L.J. 547, 582-84 (1994). The distinction is between a "dead ship" and an operational one. *See, Chandris*, 515 U.S. at 372-76. While a ship in mothballs is "out of navigation" even when it's being towed across the Atlantic, *see, West v. United States*, 361 U.S. 118, 123-24 (1959), and an unfinished ship has not yet "entered navigation" even though it has already voyaged from New Orleans to Tacoma, *see, McKinley v. All Alaskan Seafoods, Inc.*, 980 F.2d 567, 568 (9th Cir. 1992), an operating vessel with a crew aboard remains "in navigation" even when it is sitting in dry dock. *See, Chandris*, 515 U.S. 347; *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999, 1001-02 (5th Cir. 1973).

[9] *DiGiovanni* distinguishes *Gizoni I* by suggesting the plaintiff in that case was injured aboard a platform which was "engaged in

(Continued on following page)

a barge, or other float's 'purpose or primary business is *not* navigation or commerce,' then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit." *DiGiovanni,* 959 F.2d at 1123 (original emphasis). This rule is even more restrictive than the work platform doctrine, 959 F.2d at 1128 (Torruella, J., dissenting), and has been adopted by both the Sixth Circuit, *Hatch v. Durocher Dock & Dredge, Inc.,* 33 F.3d 545, 547-48 (6th Cir. 1994), and the California Court of Appeal. *Spears,* 101 Cal.App.4th at 475. It is also the basis for the decision below. *Stewart I,* 230 F.3d at 467, *Appendix B,* p. 22.

E. The vessel standards of the First, Second, Fifth, Sixth and Eleventh Circuits cannot be reconciled with the decisions of this Court

1. The floating work platform doctrine is in tension with this Court's decisions in *Senko, Gizoni I* and *Grubart*

The work platform doctrine cannot be reconciled with this Court's opinions in *Gizoni I, supra, Senko v. LaCrosse Dredging Corp.,* 352 U.S. 370, 371 (1957), or *Grubart v. Great Lakes Dredge & Dock,* 513 U.S. 527 (1995). *Senko* upheld the Jones Act verdict of a "handyman" who was injured on a levee in Illinois while serving a dredge "which, though afloat, served as a stationary earth removing machine." 352 U.S. at 371. *Gizoni I* reversed a defense

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transportation" at the time and place of his injury. 959 F.2d at 1124. In fact, that platform was then and there "secured to the end of a floating dry dock[.]" *Gizoni II,* 56 F.3d at 1140 n.1.

summary judgment and remanded the putative Jones Act claims of a shipyard hand who spent most of his time working aboard a fleet of "floating platforms."

> These platforms by themselves have no power, means of steering, navigation lights, navigation aids, or living facilities. They are moved about by tugboats, which position the platforms alongside vessels under repair at berths or in drydock at Southwest Marine's shipyard or at the nearby naval station. The platforms are used to move equipment, materials, supplies, and vessel components around the shipyard and onto and off of the vessels under repair. Once in place, the plaftorms support ship repairmen engaged in their work.

502 U.S. at 83-84. While the craft in *Senko* and *Gizoni I* ferried workers and equipment as an incident of their overall missions, there is nothing to suggest that they were used primarily for transportation. This Court has never made that a prerequisite of vessel status.

In *Grubart*, for example, it was obliged to consider the vessel status of a derrick barge deployed "to replace wooden pilings clustered around the piers of several bridges spanning the Chicago River." 513. U.S. at 530. That case concerned the notorious pile driving mishap that flooded a utility tunnel beneath the Chicago River and blacked-out several adjoining skyscrapers. This Court accepted *certiorari* to decide whether admiralty enjoyed jurisdiction over such a calamity under the Vessel Owner's Limitation Act. 46 U.S.C. §§ 181 *et seq.* One of the threshold issues was whether the accident barge was a vessel in navigation. "Even though the barge was fastened to the river bottom and was in use as a work platform at the times in question," the Court allowed as how no one could

"seriously dispute the conclusion of each court below that the Great Lakes barge is, for admiralty tort purposes, a 'vessel.'" *Id.* at 355.

2. The actual transit test is in tension with this Court's decisions in *Wilander*, *Chandris* and *Harbor Tug*

The actual transit test employed by *DiGiovanni* and the decisions below can't be reconciled with the opinions of this Court. *Senko,* once again, upheld seaman status for an Illinois dredge hand injured in the service of "a stationary earth removing machine." 352 U.S. at 371. There is nothing in that opinion to imply this floating machine wasn't stationary at the time of the injury. More importantly, the actual transit test not only resuscitates the "aid to navigation" requirement this Court jettisoned in *Wilander,* 498 U.S. at 353, it is inconsistent with *Chandris* and *Harbor Tug*. Under those opinions, a plaintiff's Jones Act status must be determined, not from a fleeting "snapshot" of his duties at the moment of injury, but "'in the context of his entire employment' with his current employer." *Chandris*, 515 U.S. at 366; *Harbor Tug*, 520 U.S. at 558 (1997). The idea is "to avoid engrafting upon the statutory classification of a 'seaman' a judicial gloss so protean, elusive, or arbitrary as to permit a worker to walk into and out of coverage in the course of his regular duties." *Chandris*, 515 U.S. at 363. The actual transit test coats the standard for vessel status with just such a gloss. The California Court of Appeal's decision in *Gault* provides the perfect case in point.

Though that decision borrowed indiscriminately from the conflicting Jones Act jurisprudence of three different circuits,[10] it took special pains to distinguish *DiGiovanni. Gault* allowed a jury to determine the seaman status of a pile driver employed aboard a "flexi-float barge" deployed to build a bridge over a flood control channel. 100 Cal.App.4th at 996. The barge had no independent means of propulsion and was lying at anchor at the time of the accident. *Id.* It consisted of three 10- by- 60-foot sections that could be reconfigured in various ways. *Id.* The plaintiff was injured while reconfiguring the barge when the section on which he was standing capsized after it had been separated from the others. *Id.* The State Court of Appeal found a triable issue of material fact as to whether the capsized section had been "in transit" at the moment of the accident. *Id.* at 1002. We submit that, after *Chandris,* a special purpose craft cannot oscillate in and out of vessel status (or carry its crew in and out of Jones Act coverage) at the uncoupling or re-coupling of a flexifloat.

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[10] At various points in its opinion, the State Court of Appeal cites authority from the First Circuit, *DiGiovanni, supra,* the Fifth Circuit, *In re Endeavor Marine, Inc.*, 234 F.3d 287 (5th Cir. 2000), and the Ninth Circuit. *Heise v. Fishing Co. v. Alaska, Inc.*, 79 F.3d 903 (9th Cir. 1996); *Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289 (9th Cir. 1997); *Delange v. Dutra Const. Co., Inc.*, 183 F.3d 916 (9th Cir. 1999). That authority is in conflict. Unlike *DiGiovanni, Endeavor Marine* and *Delange* allowed Jones Act claims for workers who were injured aboard anchored crane barges.

F. The conflict between the lower courts shows no sign of abating

Although the Fifth Circuit has recently queried whether the work platform doctrine should sail on in the wake of this Court's decision in *Gizoni I,* it has not expressly abandoned that doctrine. *See*, *Manuel v. P.A.W. Drilling Well Service, Inc.,* 135 F.3d 344, 347-50 (5th Cir. 1998).[11] But the Ninth Circuit has renounced it. *Martinez,* 303 F.3d at 1136-37. That Circuit has also rejected *DiGiovanni. Id.* at 1136 n.2. So has the Second Circuit. *Tonnensen,* 82 F.3d at 34. But the First Circuit refuses to abandon ship. 230 F.3d at 467, *Appendix B* at 23. Until these conflicts have been resolved, the construction of the Jones Act will continue to be uncertain, and the lower courts will have to re-examine, narrow or distinguish all the conflicting authority on point over and over again.

[11] The plaintiff in *Manuel* was an oil field hand injured aboard a spud barge anchored over an abandoned well head. The trial court had relied on the work platform doctrine to dismiss his Jones Act claims on the ground that his spud barge was not a vessel. The Fifth Circuit reversed and questioned the continued vitality of the work platform doctrine after noting that "many of our work platform cases were decided before the Supreme Court's decision in *Southwest Marine, Inc. v. Gizoni*, where the Court concluded that genuine issues of material fact existed 'regarding whether the floating platforms [upon which plaintiff Gizoni had worked] were vessels in navigation.'" *Id.* at 350 n.8 (*quoting Gizoni I*, 502 U.S. at 92). As the decision observed, "special purpose craft such as submersible drilling barges, jack-up rigs, and spud barges remain stationary while performing work, yet retain their vessel status." *Id.* at 351.

II. This Court should also accept *certiorari* to bring the interpretation of the Jones Act back in step with the LHWCA

Although the relevant provisions of the Jones Act do not use the term "vessel," the LHWCA does. That statute specifically excludes "a master or a member of a crew of any vessel" from its protection. 33 U.S.C. § 902(3)(G). Since that phrase was designed to bar Jones Act beneficiaries from LHWCA benefits, it is not only synonymous with the term "seaman," it codifies "the key requirement for Jones Act coverage[.]" *Wilander,* 498 U.S. at 347; *Chandris,* 520 U.S. at 553. One might therefore assume that the term "vessel" has the same meaning under the LHWCA as it does under the Jones Act. But according to the lower courts: "The LHWCA definition of 'vessel' is significantly more inclusive than that under the Jones Act." *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603, 607 (1st Cir. 1996). Most maritime workers therefore append an alternative fourth cause of action for vessel owner negligence[12] to the "trilogy of heightened legal protections" traditionally pled under the Jones Act.[13] *See e.g., Kathriner,* 975 F.3d 662-63; *DiGiovanni v. Traylor Bros.* ("*DiGiovanni II*"), 97 F.3d 624 (1st Cir. 1996). Quite apart

[12] Though LHWCA compensation is ordinarily an injured waterfront worker's exclusive remedy against his or her employer, 33 U.S.C. § 905(a), that rule does not apply to a "dual-capacity" defendant. *See generally,* 1 Schoenbaum, *supra*, § 7-10, pp. 449-50. A dual capacity defendant can be liable for both workers' compensation *and* vessel owner negligence. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 530-31 (1983); 1 Schoenbaum, *supra,* p. 450.

[13] The Jones Act carries with it the rights to sue for negligence, unseaworthiness and maintenance, cure and found. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995).

from the inefficiency and expense these alternative claims beget, they beg the question: Why should courts employ different standards for determining what is or is not a vessel under the Jones Act and the LHWCA?[14]

Most lower courts employ the statutory definition in 1 U.S.C. § 3 to determine whether a floating structure is "vessel" under the LHWCA. *McCarthy v. The Bark Peking,* 716 F.2d 130, 133-34 (2nd Cir. 1983); *Kathriner,* 975 F.2d at 662; *Morehead, supra*; *DiGiovanni v. Traylor Bros.*, 830 F.Supp. 106, 108-109 (D.R.I. 1993): Since this Court has used 1 U.S.C. § 3 to uphold vessel status under the Jones Act, *Norton,* 321 U.S. at 571 n.4, it is difficult to understand why that Rule should not be universally applied.

III. The Court should finally accept *certiorari* to alleviate the uncertainties still besetting maritime workers employed at the borderline between the Jones Act and the LHWCA

Courts and commentators have long recognized "the difficulties faced by injured maritime workers arguably both seamen and harbor workers who must choose whether and by what means they will pursue remedies that in substantive theory are perfectly mutually exclusive (the Compensation Act, which for present purposes applies to all *but* seamen, and the Jones Act, which applies *only* to seamen), but which seem in practice to frequently overlap

[14] The first circuit explains this disparity by noting that a Jones Act seaman "'must have a substantial employment-related connection to a vessel *in navigation.*'" *Morehead,* 97 F.3d at 607 n.3 *quoting Chandris,* 515 U.S. at 368 (emphasis original). But this explanation misconstrues the phrase "in navigation." *See* n.8 *supra.*

each other's borders." *Simms v. Valley Lines, Inc.*, 709 F.2d 409, 411 (5th Cir. 1983); *see also, Gizoni I,* 502 U.S. at 91; *Figueroa v. Campbell Industries,* 45 F.3d 311, 315 (9th Cir. 1995); *Boatel, Inc. v. Delamore,* 379 F.2d 850, 854 (5th Cir. 1967). "Thus, despite our continued insistence that a Jones Act 'seaman' and a 'crew member' excluded from the Longshoremen's Act are one and the same (in other words that the statutes are mutually exclusive), we recognize that in a practical sense, a 'zone of uncertainty' inevitably connects the two Acts." *Simms, supra* (citations omitted).

This Court eliminated much of that uncertainty when it clarified the relationship which the Jones Act and the LHWCA require between a vessel and a member of a crew. *Chandris, supra,* 515 U.S. at 368; *Wilander*, 498 U.S. at 356. The conflicting standards for vessel status are the only thing still obscuring that relationship. Most of the inconsistent results which continue to plague this corner of the law are attributable to that conflict. *Compare e.g., Bennett,* 510 F.2d at 116 (barge-based bridge builder could be seaman because his barge was capable of transporting "passengers, cargo or equipment across navigable waters"); *DiGiovanni,* 959 F.2d at 1121 (barge-based bridge builder could not be seaman because his barge was not "in transit at moment of injury"); *Tonnensen,* 82 F.3d at 36 (barge-based bridge builder could be seaman because there was "some evidence" that his barge had transportation function); *Sharp,* 917 F.2d at 888-89 (barge-based bridge builder could be seaman because transportation function of his barge was "more than incidental"); *Gipson,* 972 F.Supp. 537, 542-43 (barge-based bridge builder could not be seaman because his barge was not used "primarily for navigation and commerce"); *Becker v. Dillingham Construction Pacific, Ltd.,* 2001 AMC 1376, 1386-88 (D.C.Haw.

2001) (barge-based bridge builder could be seaman because his barges were capable of transportation); *Gault*, 100 Cal.App.4th 991, 1005 (flexifloat-based bridge builder could be seaman because float on which he was standing at moment of injury was uncoupled). The Court could alleviate that uncertainty, and make it easier for employers to predict which of their workers will be covered by the Jones Act and which will be covered by the LHWCA, *see, Harbor Tug*, 520 U.S. at 558, if it accepts *certiorari* in this case.

CONCLUSION

WHEREFORE the USFMLJ respectfully submits that Willard Stewart's petition for a writ of *certiorari* should be granted.

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JOHN R. HILLSMAN
MCGUINN, HILLSMAN & PALEFSKY
535 Pacific Avenue
San Francisco, CA 94133
(415) 421-9292

Counsel for the University of San Francisco Maritime Law Journal, Amicus Curiae